

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Service Rules for the 698–746, 747–762)	WT Docket No. 06-
150		
And 777–792 MHz Bands)	
)	
Implementing a Nationwide,)	PS Docket No. 06-
229		
Broadband, Interoperable Public)	
Safety Network in the 700 MHz)	
Band)	

COMMENTS OF LEAP WIRELESS INTERNATIONAL, INC.

Robert J. Irving Jr.
Senior Vice President and
General Counsel
Leap Wireless International, Inc.
10307 Pacific Center Court
San Diego, CA 92121

James H. Barker
Barry J. Blonien
Joseph A. Bissonnette*
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004-1304
(202) 637 2200

Counsel for
Leap Wireless International,
Inc.

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Leap Wireless International, Inc. and its subsidiaries (collectively, “Leap”) submit the following comments in response to the Commission’s Second Further Notice of Proposed Rulemaking in the above-captioned proceeding.¹

INTRODUCTION AND SUMMARY

Leap applauds the Commission’s willingness to reevaluate the rules for the 700 MHz D Block auction and the terms of the Public/Private partnership. Leap recognizes the importance of public safety networks and the Commission’s efforts to establish a nationwide, interoperable network for public safety operators. Leap also agrees that vast benefits can flow from joint public and commercial use of the

¹ Service Rules for the 698–746, 747–762 and 777–792 MHz Bands, WT Docket No. 06-150, Implementing a Nationwide Broadband, Interoperable Public Safety Network in the 700 MHz Band, PS Docket No. 06-229, *Second Further Notice of Proposed Rulemaking*, FCC 08-128 (May 14, 2008) (“*D Block NPRM*”).

remaining 700 MHz spectrum, potentially bringing new, competitive voice, video, and data services to consumers across the nation—but only if the rules are properly structured.

As a threshold matter, the Commission should take this opportunity to consider the likely market impacts of re-auctioning the D Block license, particularly in light of the results of Auction 73. Instead of revitalizing competition in the wireless market, as the Commission intended, Auction 73 led to increased concentration in the wireless industry as the nation's two largest carriers walked away with the vast majority of the licenses offered, measured in terms of license value. Whatever approach the Commission ultimately adopts to license the D block, it should take steps to ensure that other carriers, including new entrants and non-traditional players, have access to this extremely valuable spectrum. This will ensure that all wireless consumers, including those underserved by the existing national carriers, reap the benefits of more robust competition. Correspondingly, the Commission should restrict the participation of large entities that already have significant access to 700 MHz spectrum.

As to accomplishing the Commission's stated goal of promoting public safety by facilitating a Public/Private partnership in connection with the D Block, the Commission must identify and remove the obstacles that impeded success in the initial D Block auction. In this regard, Leap believes the auction and service rules failed in two critical respects.

First, the rules were complex and lacked the necessary clarity and specificity as to the rights and obligations of a D block licensee, particularly vis-à-vis the process of dealing with the public safety licensee. A successful bidder must commit substantial financial and other resources to this undertaking, and significant confusion and uncertainty surrounding the Public/Private partnership made it impossible for potential bidders effectively to assess the business risks on behalf of its customers, shareholders, and other stakeholders.

Second, the Commission held unrealistic expectations for the public safety side of the network. Absent federal funding to help subsidize the cost of building and maintaining the network, the Commission must ensure, first and foremost, that the project is commercially viable. The Public/Private partnership will remain unattainable if the Commission adopts complex and burdensome service rules that do not take into account consumer demand and other marketplace realities.

I. THE FCC SHOULD RESTRICT AUCTION ELIGIBILITY TO PARTIES THAT DO NOT ALREADY HAVE SIGNIFICANT ACCESS TO 700 MHz SPECTRUM

The CMRS marketplace is currently dominated by four nationwide carriers, and with Verizon poised to acquire Rural Cellular² and Alltel,³ industry

² See Press Release, Department of Justice, Justice Department Requires Divestitures in Verizon's Acquisition of Rural Cellular Corp. (June 10, 2008), *available at* http://www.usdoj.gov/atr/public/press_releases/2008/233921.htm (last visited on June 10, 2008) (approving Verizon's acquisition of Rural Cellular with some divestitures).

³ See Press Release, Verizon Wireless, Verizon Wireless to Acquire Alltel; Will Expand Nation's Most Reliable Wireless Network (June 5, 2008), *available at*

concentration is proceeding apace. The Commission hoped that Auction 73 would introduce new wireless competitors and reinvigorate competition in the CMRS marketplace. Unfortunately, that outcome failed to materialize. Instead, the market share of the nation's largest carriers only grew larger, while other carriers and potential new entrants were left in the cold.⁴ The Commission now has an opportunity to mitigate, at least to some degree, the failure of Auction 73 to produce a more competitive environment. As Commissioner McDowell remarked in his separate statement to the *Second Report and Order*, “[d]epriving the nascent 700 MHz market place of small new entrants will result in less innovation and competition, not more. Consumers could be short-changed as a result.”⁵ Leap agrees. Consistent with past practice, the Commission should limit eligibility in the upcoming D-block auction to those entities that did not win a substantial amount of spectrum in Auction 73.

A. The Market for Mobile Telephony Is Highly Concentrated

Although the Commission has often painted a rosy picture of the state of competition in the wireless market, the reality, backed by an abundance of data, is

<http://newscenter.verizon.com/press-releases/verizon/2008/verizon-wireless-to-acquire.html> (last visited June 10, 2008).

⁴ See Howard Buskirk, *Verizon, AT&T Account for Most 700 MHz Bids*, COMMUNICATIONS DAILY, Mar. 21, 2008, at 1–2; Spencer E. Ante, *FCC Auction: ‘The Big Get Bigger’*, BUSINESSWEEK, March 20, 2008, available at http://www.businessweek.com/print/technology/content/mar2008/tc20080320_680397.htm (last visited June 10, 2008).

⁵ See Service Rules for the 698–746, 747–762 and 777–792 MHz Bands, WT Docket No. 06-150, *Second Report and Order*, 22 FCC Rcd 15289, 15572 (2007) (“*Second Report and Order*”)

that market power is increasingly being consolidated into the hands of the two largest carriers—AT&T and Verizon—and that consumers are very likely to suffer as a result. In its order approving the AT&T-Dobson merger,⁶ the Commission increased the 70 MHz spectrum threshold it had previously employed as an initial screen to evaluate the market impact of a merger or spectrum transfer to 95 MHz, based on the increased availability of spectrum. Applying the 95 MHz spectrum screen, which is approximately one-third of the total spectrum suitable for mobile telephony—including the 700 MHz spectrum made available in Auction 73⁷—AT&T’s or Verizon’s spectrum holdings exceed that screen in 8 of the top 10 markets, 17 of the top 25 markets, and 38 of the top 100 markets.⁸

Even before the auction, and not accounting for the additional spectrum that AT&T acquired from Dobson and Aloha and that Verizon acquired from Rural Cellular, AT&T and Verizon accounted for 53% of all industry revenue; together

⁶ *AT&T-Dobson Order* at 20308–09, ¶ 21.

⁷ The Commission has repeatedly and consistently found that evaluating the market for mobile telephony service provides a “reasonable assessment of any potential competitive harm resulting from the transactions under review.” *AT&T-Dobson Order* at 20308–09, ¶ 21; Applications for the Assignment of License from Denali PCS, L.L.C. to Alaska DigiTel, L.L.C. and the Transfer of Control of Interests in Alaska DigiTel, L.L.C. to General Communications, Inc., WT Docket No. 06-114, *Memorandum Opinion and Order*, 21 FCC Rcd 14863, 14876, at ¶ 25 (2006); *Sprint-Nextel Order* at 13983, ¶ 38; *AT&T Wireless-Cingular Order* at 21557, ¶ 74.

⁸ See Alan Weissberger, Viodi View, *FCC 700 MHz Auction Postscript: Big Loss for US Wireless Network Competition* (Apr. 11, 2008), available at <http://viodi.com/2008/04/11/fcc-700-mhz-auction/>.

with Sprint and T-Mobile, the top four firms account for 90%.⁹ As discussed below, the results of Auction 73 have exacerbated this problem.

B. As a Result of Auction 73, The Nation's Two Largest Carriers Have Obtained the Lion's Share of this Extremely Valuable Spectrum

Verizon and AT&T, already the largest wireless carriers, dominated the bidding in Auction 73. Verizon walked away with all of the C Block licenses covering the contiguous United States and Hawaii. Verizon also obtained 9 of the 10 most valuable A Block licenses and 77 B Block licenses.¹⁰ AT&T obtained 227 licenses in the B Block, reaching 62% of the nation's POPs. In the B and C Blocks, no other bidder came close.¹¹ AT&T's and Verizon's combined total spent on the auction was \$16 billion—or 83 percent of the auction total.

It is widely acknowledged that the spectrum in the 700 MHz Band is very valuable relative to other spectrum bands because it has excellent propagation characteristics, with high permeability and low absorption.¹² Thus, it is essential

⁹ See Peter Crampton, Andrzej Skrzypacz, and Robert Wilson, *The 700 MHz Spectrum Auction: An Opportunity to Protect Competition in a Consolidating Industry* (Nov. 13, 2007), available at <http://www.usdoj.gov/atr/public/workshops/telecom2007/submissions/227839.htm>.

¹⁰ See *id.*

¹¹ The only other significant winners in the B and C Blocks were US Cellular, which obtained 127 B Block licenses covering 6.6% of POPs, and CenturyTel, which obtained 48 B Block licenses covering 2.4% of POPs. See <http://www.wirelessstrategy.com/auction.html> (providing a breakdown of auction results).

¹² See, e.g., FCC Media Bureau Staff Report, *Concerning Over-the-Air Broadcast Television Viewers*, MB Docket No. 04-210, 2005 WL 473322 (Feb. 28, 2005) (“The 108 MHz of spectrum available because of the digital transition “is ‘beachfront’ spectrum, with propagation characteristics that make it ideal for

that the FCC carefully evaluate its auction rules over the remaining 700 MHz spectrum covered by the D Block to ensure that the public reaps the full measure of benefit from the auction.

C. The Commission Should Structure Its Auction Eligibility Rules to Avoid Further Concentration and to Facilitate Competition

Regardless whether the FCC decides to maintain the approach of creating a Public/Private partnership, it is essential that another competitive carrier have access to the 700 MHz band. Thus, the Commission should impose a one-time eligibility rule specific to the 700 MHz band, prohibiting any current license holder or winning bidder that already can reach more than 50% of the nation's POPs through its 700 MHz holdings.

Section 309(j)(3) of the Communications Act requires the Commission to design its bidding rules with the objective of "avoiding excessive concentration of licenses" and "disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women."¹³ If the FCC permitted a party that has already acquired significant access to this "beachfront property" to be eligible to accumulate more spectrum in the re-auction of the D Block, it would be acting directly contrary to these principles, which have already been under-served in Auction 73. The public interest would clearly be best advanced by structuring the D Block eligibility rules

providing wireless broadband access through foliage and building walls."); Statement of Commissioner Robert M. McDowell before the House Subcommittee on Telecommunications and the Internet, Committee on Energy and Commerce (Apr. 15, 2008) (referring to the "beach front" quality of the 700 MHz Band).

¹³ 47 U.S.C. § 309(j)(3)(B).

to maximize the potential of new competitive uses of the 700 MHz band, along with the interests of public safety.

D. The FCC Has Restricted Eligibility In Other, Comparable Proceedings

In adopting rules for the auction of additional DBS licenses, the Commission adopted a one-time rule prohibiting incumbent licensees from bidding because it recognized that “competition among DBS operators is likely to be enhanced by the entry of additional DBS operators that are not connected with current providers.”¹⁴ In its 2000 auction of the 700 MHz Guard Band, the FCC imposed an auction eligibility provision prohibiting one party from winning both licenses in a given market, because it found that permitting one licensee to obtain both licenses would increase access to the spectrum by small businesses and would reduce the likelihood that the licensees would “unreasonably restrict[] access to their spectrum.”¹⁵

Similar to the approach the FCC has taken in these other auctions, it should adopt a one-time rule for the D Block re-auction. In the event of any subsequent assignment or transfer of the license, the FCC could of course revisit the issue of whether any aggregation of 700 MHz spectrum would be in the public interest.

¹⁴ See Revision of Rules and Policies for Direct Broadcast Satellite Service, IB Docket No. 95-168, PP Docket No. 93-253, *Order*, 11 FCC Rcd 9712, 9731, at ¶¶ 49, 61–66 (1995).

¹⁵ Service Rules for the 746–764 and 776–794 MHz Bands and Revisions to Part 27 of the Commission’s Rules, WT Docket No. 99-168, *Second Report and Order*, 15 FCC Rcd 5299, 5326 ¶¶ 62–63 (2000).

II. THE COMMISSION MUST CLEARLY SPECIFY ACHIEVABLE AND COMMERCIALY REASONABLE OBLIGATIONS FOR THE D BLOCK LICENSEE

The construction of a dual-purpose nationwide network will be a substantial and costly undertaking. Given its scope and its unprecedented nature, this project will entail a considerable amount of risk for the commercial D Block licensee. However, no party will be willing to undertake that risk without having some reasonable ability to assess the value of such an investment. Especially in the present financial environment, potential financing sources for this project will also need greater certainty about the risks and rewards. In Auction 73, the Commission's rules failed to provide enough clarity and specificity as to the rights and obligations of the licensee to allow for a meaningful valuation of the spectrum. Equally important, the daunting service rules laid out in the *Second Report and Order* did not reflect the realities of commercial operations or economics and would have imposed prohibitive costs on the winning bidder, undermining any commercial rationale for participating in the auction. If the Commission plans to rely on private funding to bring the Public/Private partnership to fruition, it must ensure that private sector bidders can meet the regulatory requirements while at the same time developing the D Block spectrum into a successful and profitable venture. That will not be accomplished unless the Commission streamlines and simplifies the D Block regulations.

A. Uncertainty Surrounding the Public/Private Partnership Was An Insurmountable Barrier in the First Auction

Leap endorses the FCC's goal of promoting public safety and is generally supportive of the Public/Private model that the FCC envisions for the D Block license. Leap believes that model will only succeed, however, if the FCC resolves the previous shortcomings in the rules.

Bright-line rules are essential so that bidders can properly value the D Block license.¹⁶ In Auction 73, the D Block was burdened by too many uncertainties and too few quantifiable benefits. The *Second Report and Order* set forth a number of lofty goals and requirements but left most of the particulars to be negotiated post-auction, with a clock running and potential penalties in the event an agreement could not be reached. This scheme would have left a "winning" bidder with little leverage to ensure that an acceptable compromise would be achieved. It is therefore unsurprising that no bidder wanted to shoulder that risk.

The Commission must reduce uncertainty by specifying, to the greatest degree possible, what the rights, burdens, and obligations will be for a winning bidder prior to re-auction of the D Block. The Commission should also provide a sufficient amount of time before the next auction to ensure that potential bidders and public safety administrators have ample opportunity to identify and resolve any remaining issues. Thus, the Commission should schedule the auction for no sooner than mid-2009.

¹⁶ See, e.g., Jonathan R. Hay, Andrei Schleifer, and Robert W. Vishny, *Toward a Theory of Legal Reform*, 40 European Econ. Review 559 (1996) (outlining the benefits of bright-line rules).

B. The FCC Must Set Out Achievable and Commercially Realistic Requirements for the Public/Private Partnership

In the *Second Report and Order*, the Commission required the D Block licensee, among other things, to provide signal coverage and offer service to at least 99.3 percent of the population by the end of the tenth year of service; to build a hardened network to the reliability and performance specifications of public safety; to provide commercial state-of-the-art voice, video, and data service interoperable across the networks of public safety agencies nationwide; to include state of the art encryption and public-safety specific features; and to include a network management system that would allow for real-time prioritization of public safety access answerable, presumably, to countless public safety agencies. Moreover, after investing in this network, the commercial provider would have to recoup its costs over the course of a mere ten-year license term.¹⁷

As a practical matter, these requirements do not present a realistic opportunity for a commercial entity to make a sufficient return on its investment to justify the venture to its shareholders—let alone to continue operating the network as a going enterprise. The Public/Private partnership will succeed only if the Commission acknowledges that public safety desires must be tempered by legitimate business concerns. As such, the Commission should streamline and simplify its D Block rules as follows:

(1) Because the investments required of the D Block licensee will be substantial and the licensee will require time to recover these investments, the

¹⁷ See *Second Report and Order* at 15433–34, ¶ 405.

term of the license should be extended to fifteen years, a period of time that is consistent with other spectrum licenses contemplated for advanced wireless services, such as many AWS-1 licenses.¹⁸

(2) The Commission should designate the Public Safety Spectrum Trust (“PSST”) as the single point of contact for dealing with the D Block licensee and interfacing with the public safety community. In this fashion, the D Block licensee and the public safety community can effectively negotiate and resolve all issues that may arise during the license period. The D Block licensee will provide the underlying network construction and operational support for public safety uses of the network, while the PSST will deal with all of the constituent public safety agencies across the country and address their specific service needs.

(3) In order to ensure that network deployment costs are not excessive, there should be no specific security, robustness, or reliability service levels placed on the network beyond those that generally apply to nationwide commercial CMRS networks. The network should be built to commercially reasonable specifications. To the extent that the PSST (on behalf of itself or any other public safety agency or organization) desires more specific service levels, redundancy, hardening, or other additional features, the D Block licensee would be required to negotiate in good faith to accommodate these requests, acting as a contractor, and *at the contracting party’s* expense, would upgrade the network as specified and provide such additional features. All such public safety requests would be funneled through the

¹⁸ See 47 C.F.R. § 27.13(g).

PSST, and the requesting public safety agency or organization should be responsible for both capital and operating costs of these advanced network features.

(4) The performance requirements relating to the construction of the network should be set at the same level as was set for the C Block in Auction 73. If the public safety community requires terrestrial network construction beyond the levels set in the C Block (75% of the population by the end of year 10), then the public safety community should be required to finance the additional construction costs. For areas without terrestrial network coverage, the Commission could ensure that public safety officials have adequate service by (1) permitting the carrier to use other alternatives for satisfying coverage requirements (*e.g.*, satellite), or (2) ordering all network operators to enable automatic roaming access on their networks to all public safety subscribers with compatible devices. In addition to improving overall service coverage area for public safety officials, these requirements would also provide excellent backup solutions in the event the 700 MHz Public/Private network is rendered inoperable.

(5) The D Block licensee should have the ability to evaluate all proposed devices to be used on the 700 MHz network and to set reasonable device requirements in order to ensure integrity and operating quality of the network.

(6) The D Block licensee should be held free from liability for any and all public safety use of the 700 MHz Public/Private network.

(7) Finally, to avoid the complications of a potentially cumbersome emergency priority access system, public safety users should be granted priority

usage to an equivalent of 50% of available network capacity on the 700 MHz Public/Private network at all times, with no other preemption requirements on the network. This approach would not only eliminate the need for the Commission to define the myriad circumstances that constitute an “emergency” or to decide who has authority to declare such an emergency, but would also better meet the needs of both public safety and individual subscribers to the network.

To be sure, Leap does not take issue with the Commission’s decision to designate public safety as a top priority and to build the best possible public safety network. The Commission must recognize, however, that under a Public/Private framework as envisioned by the Commission, it is the D Block licensee—not the federal government or the public safety community—that must put forward a substantial investment and accept the risks of building and operating the network. The Commission will overcome the obstacles it encountered in Auction 73 only if it clearly sets out the requirements for the D Block licensee and balances the public interest objectives with a pragmatic understanding of what is commercially feasible. Leap is hopeful that, if the Commission adopts this proposed approach, then it may be able to achieve its goal of creating an unprecedented and invaluable interoperable nationwide public safety network that will also bring tremendous benefits to consumers.

CONCLUSION

The D Block auction and the creation of a nationwide public safety network is, as Commissioner Copps remarked in his statement on the *D Block NPRM*, a

“pressing and unbelievably important task.” Leap encourages the Commission to proceed with diligence in this matter, but in order to give this task the best chance of success, the Commission should take all of the time, care, and consideration needed to clarify and simplify the rules governing this complex Public/Private framework.

For the sake of effective competition in the wireless market, Leap encourages the Commission to limit eligibility of bidders for the D Block to those entities that were not already big winners in Auction 73. Additionally, Leap emphasizes the critical need for the Commission to provide clarity and specificity as to the operation of the Public/Private partnership sufficient to allow potential bidders to effectively value the D Block and to obtain the financing necessary to move forward with such an ambitious project. Finally, Leap respectfully requests that the Commission adopt more realistic expectations of what can be accomplished through the Public/Private partnership. The Commission must take a practical approach and formulate achievable requirements for the D Block. With the proper framework the Commission has a rare opportunity to broaden competition for wireless services and bring new service offerings to consumers, while at the same time creating a crucial new resource for our nation’s public safety community.

Respectfully submitted,

-/s/-

Robert J. Irving Jr.
Senior Vice President and
General Counsel
Leap Wireless International, Inc.
10307 Pacific Center Court
San Diego, CA 92121

James H. Barker
Barry J. Blonien
Joseph A. Bissonnette*
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004-1304
(202) 637 2200

Counsel for
Leap Wireless International,
Inc.

* Not licensed to practice law in the District of Columbia; all work supervised by a member of the D.C. Bar.